Supreme Court, U.S.
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No. 98-942

IN THE

Supreme Court of the United States

October Term, 1998

WILLIAM FIORE,

Petitioner,

v.

GREGORY WHITE, Warden of the State Correctional Institution at Pittsburgh; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

At a single trial and on the same facts, petitioner and his employee co-defendant were convicted under Pennsylvania law of disposing of environmental waste without a permit. After petitioner's conviction was affirmed by a Pennsylvania intermediate appellate court and discretionary review was denied by the Pennsylvania Supreme Court, his co-defendant's conviction was reversed by the Pennsylvania Supreme Court because the state had not proved lack of a permit, an essential element of the crime charged.

1. In ascertaining the elements of a state criminal offense so as to test the sufficiency of the trial evidence under the Due Process Clause, must a federal habeas court disregard the authoritative construction of the elements by the state supreme court because of retroactivity concerns, when the state supreme court's ruling was based on plain statutory language?

2. In examining the sufficiency of the trial evidence on collateral review, is a federal court bound by a decision of a state's intermediate appellate court that infringed upon a petitioner's due process right to notice that his conduct was criminal?

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INTERESTS OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nationwide, non-profit voluntary association of criminal defense lawyers founded in 1958. NACDL presently enjoys a membership of more than 10,000 attorneys. NACDL is affiliated with 68 state and local criminal defense organizations with which it works cooperatively on issues related to criminal law and procedure. Consequently, it speaks for more than 28,000 criminal defense lawyers nationwide. Among NACDL's objectives are to ensure the proper administration of criminal justice and to promote proper application of federal habeas corpus law to correct the injustice that occurs when a person who is not guilty is convicted in state court.

SUMMARY OF ARGUMENT

Petitioner Fiore's conviction and continued incarceration for felonious violation of Pennsylvania's Solid Waste Management Act ("SWMA"), PA. STAT. ANN. tit. 35, § 6018 (West 1993), constitutes a textbook violation of the Due Process Clause of the Fourteenth Amendment. Fiore was charged and convicted under section 401 of the SWMA which prohibits the "storage, transportation, treatment, or disposal" of hazardous waste "unless [a] person . . . has first obtained a permit." *Id.* § 401, PA. STAT. ANN. tit. 35, § 6018.401. Violation of this provision is a second degree felony, punishable by imprisonment of "not less than two but not more than ten years." *Id.* § 606(f), PA. STAT. ANN. tit. 35, § 6018.606(f). At trial and through numerous levels of review, the Commonwealth conceded that Fiore possessed a permit to

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[1] In accordance with Supreme Court Rule 37.6, *amicus curiae* represents that no party other than counsel for *amicus* authored this brief in whole or in part, and no person or entity, other than *amicus*, has made a monetary contribution to the preparation or submission of this brief. The petitioner and respondents have consented to the filing of this brief, and *amicus* has filed the letters of consent with the Clerk of the Court, pursuant to Supreme Court Rule 37.3.

dispose of waste. Contrary to the plain language of the statute, the Commonwealth's theory of prosecution was that Fiore so egregiously violated the conditions of the permit that the permit constructively was rendered void. No statute or regulation supported the Commonwealth's view. Fiore was also convicted under section 302(a), the seemingly appropriate charge for his conduct, which prohibits processing or disposing of waste "in a manner which is contrary to . . . any permit or to the terms and conditions of any permit or any order issued by the department." *Id.* § 302(a), PA. STAT. ANN. tit. 35, § 6018.302(a). Violation of section 302(a) is not a felony but a misdemeanor punishable by imprisonment of up to one year. The Commonwealth's felony prosecution of Fiore, based on its novel interpretation of the felony provisions of the SWMA, violated his due process right to have every element of the charge against him proved beyond a reasonable doubt; moreover, the Pennsylvania courts' affirmance of his felony conviction unforeseeably expanded a plainly worded and relatively narrow criminal statute, violating Fiore's rights under the Constitution's Due Process Clause.

The Pennsylvania Supreme Court, ruling on the appeal of Fiore's co-defendant Scarpone, rejected the Commonwealth's theory of prosecution and held that lack of a permit is an essential element of the crime defined by section 401. (J.A. 121.)[2] Following the holding in *Commonwealth v. Scarpone*, Fiore moved for and was denied post-conviction relief. The Commonwealth Court affirmed the denial, holding that the issues raised in Fiore's petition had already been litigated on direct appeal and that, under state law, the *Scarpone* decision could not be applied retroactively to Fiore's state collateral attack on his conviction. (J.A. 141.)[3] Fiore moved for federal habeas relief,

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[2] This opinion is reported at 634 A.2d 1109 (Pa. 1993). The Commonwealth Court's decision is reported at 596 A.2d 892 (Pa. Commw. Ct. 1991). For the convenience of the Court, *amicus* will cite in this brief only to the appendices submitted by the parties.

[3] This decision is reported at 665 A.2d 1185 (Pa. Super. Ct. 1995), *all. app. denied*, 675 A.2d 1243 (Pa. 1996).

which was granted by the United States District Court for the Western District of Pennsylvania because Fiore was convicted based on an interpretation of a statute that the Pennsylvania Supreme Court had determined to be improper. (Pet. for Writ of Cert., Apps. D-E.) The Third Circuit reversed, analyzing Fiore's petition not as a due process claim, but as a request to apply the *Scarpone* decision – which it held created a new law – retroactively. Relying on *Teague v. Lane*, 489 U.S. 288 (1989), and the principle that "the federal constitution has no voice on the subject of retroactivity," the Third Circuit held that Fiore's conviction could not be overturned. (Pet. for Writ of Cert., App. A.)[4]

In resolving a challenge to sufficiency of the evidence on collateral review, a federal court must determine whether a rational juror could find that each element of the offense was proved beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 314-18 (1979). The plain language of section 401 of the SWMA, the felony provision under which Fiore was convicted, required the Commonwealth of Pennsylvania to prove that Fiore lacked a permit to dispose of environmental waste. The Pennsylvania Supreme Court so held in *Scarpone*. The holding in *Scarpone* is the authoritative state court construction of the elements of the state offense – binding on federal courts on collateral review.

No retroactivity concerns, whether governed by rules of statutory interpretation or by *Teague v. Lane*, are raised by this Court's adherence to the holding in *Commonwealth v. Scarpone*. As a matter of Pennsylvania law, the *Scarpone* ruling constituted a judicial articulation of what section 401 has always meant. The decision was dictated by Pennsylvania rules of statutory construction and fundamental concepts of the due process right to notice of conduct the state deems criminal. It cannot, in any meaningful sense, be considered "new law" subject to retroactivity analysis. No federalism

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[4] This decision is reported at 149 F.3d 221 (3d Cir. 1998).

concerns would be infringed by this Court's application of the holding in *Scarpone* to ascertain whether Fiore's conviction was constitutional.

Rejecting application of the holding of *Commonwealth v. Scarpone* would require this Court to adopt a reading of section 401 that was soundly rejected by Pennsylvania's highest court and which would impermissibly expand the statute beyond its plain language. A federal court should not, in applying the sufficiency standard of *Jackson v. Virginia*, adopt an unconstitutionally broad reading to permit punishment for conduct no reasonable person would have thought covered by the state statute.

ARGUMENT

I. PETITIONER WAS DENIED DUE PROCESS BECAUSE THE COMMONWEALTH FAILED TO PRESENT ANY EVIDENCE THAT HE LACKED A PERMIT TO DISPOSE OF WASTE, AN ESSENTIAL ELEMENT OF THE CRIME CHARGED.

It is a "bedrock[,] axiomatic, and elementary" constitutional principle that the Due Process Clause of the Fourteenth Amendment protects the accused "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 363-64 (1970) (internal quotation omitted). Fiore and his employee co-defendant were charged with disposing of waste without having "first obtained a permit." SWMA § 401, PA. STAT. ANN. tit. 35, § 6018.401 (West 1993). It therefore was incumbent upon the Commonwealth to prove, beyond a reasonable doubt, that they in fact did not possess a permit when they engaged in the conduct charged in the indictment. Here, there is no dispute that the Commonwealth failed to prove that the defendants lacked a permit. It presented no evidence on the point; instead the Commonwealth argued that the defendants' conduct constructively voided their permit so that *as a matter of law, not of fact*, they did not have a "permit." Regardless of the prospective merit of such a

theory under Pennsylvania law, it is nowhere contained in the plain language of the statute. In the co-defendant's case, the Pennsylvania Supreme Court so held. A contrary interpretation cannot be applied constitutionally on the identical facts to Fiore's conduct.

Standing alone, the "no evidence" doctrine announced almost forty years ago by this Court in *Thompson v. City of Louisville*, 362 U.S. 199, 204 (1960), would be sufficient to require that Fiore be granted a writ of habeas corpus. But *Thompson* does not stand alone. The contours of the "elemental . . . due process right[]" to be free "from wholly arbitrary deprivation of liberty" were expanded some twenty years ago when the Court announced the now-familiar guarantee that "no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof – defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of every element of the offense." *Jackson v. Virginia*, 443 U.S. 307, 314-16 (1979); *accord Wright v. West*, 505 U.S. 277, 290 (1992) (under *Jackson* "a conviction violates due process if . . . 'no rational trier of fact could find guilt beyond a reasonable doubt'" from the evidence adduced at trial (quoting 443 U.S. at 317)); *see also Vachon v. New Hampshire*, 414 U.S. 478, 480 (1974) (per curiam) ("It is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a critical element of the offense charged . . . violate(s) due process." (internal quotation omitted, ellipsis in original)); *Johnson v. Florida*, 391 U.S. 596, 598-99 (1968) (per curiam). Federal courts are charged with protection of this fundamental right: "A challenge to a state conviction brought on the ground that the evidence cannot fairly be deemed sufficient to have established guilt beyond a reasonable doubt states a federal constitutional claim." *Jackson*, 443 U.S. at 322.

Jackson provides that the sufficiency of the evidence standard be applied "with explicit reference to the substantive elements of the criminal offense as defined by state law." *Id.* at 324 n.16. Federal courts are bound by authoritative state court pronouncements on the meaning of the state's own statutes:

"Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the state." *Johnson v. Fankell*, 520 U.S. 911, 916 (1997); *accord Wainwright v. Goode*, 464 U.S. 78, 84 (1983) (per curiam) ("[T]he views of the state's highest court with respect to state law are binding on the federal courts."); *Garner v. Louisiana*, 368 U.S. 157, 166 (1961) ("We of course are bound by a State's interpretation of its own statute and will not substitute our judgment for that of the State's when it becomes necessary to analyze the evidence for the purpose of determining whether that evidence supports the findings of a state court.").

A. By Its Plain Meaning and as Interpreted by the Pennsylvania Supreme Court, Section 401 of the SWMA Has Always Required the Commonwealth to Prove Lack of a Permit to Sustain a Felony Conviction.

Section 401 of Pennsylvania's SWMA provides that "no person ... shall store, transport, treat, or dispose of hazardous waste within this Commonwealth ... unless such person ... has first obtained a permit." SWMA § 401, PA. STAT. ANN. tit. 35, § 6018.401. By its very terms, this section requires proof that a person has not obtained a permit. *Cf. Commonwealth v. McNeil*, 337 A.2d 840, 843 (Pa. 1975) (under statute that prohibited carrying a concealed firearm "without a license," "the absence of a license is an essential element of the crime").

The plain meaning of section 401 was recognized by the Supreme Court of Pennsylvania and adopted as its proper construction in the *Scarpone* decision, which overturned the conviction of Fiore's co-defendant. The court reasoned that Scarpone could not be convicted of operating a waste disposal facility without a permit because, "simply put Mr. Scarpone did have a permit." (J.A. 121.) The court unequivocally stated that "the statutory language here cannot be stretched to include criminal activities which clearly fall under another statutory section or subsection" and refused to endorse the

"bald fiction" that violation of a permit was tantamount to not having one. (J.A.122.)[5]

Under well established Pennsylvania doctrine, the Pennsylvania Supreme Court's ruling did not assign new meaning to the statute but rather served as an explication of what the statute had meant from the time of its enactment. The Supreme Court of Pennsylvania has adhered to this principle for half a century or more. "The general precept in Pennsylvania is that 'the construction placed upon a statute by the courts becomes a part of the act, from the very beginning.'" *Ettinger v. Central Penn Nat'l Bank*, 634 F.2d 120, 124 (3d Cir. 1980) (quoting *Buradus v. General Cement Products Co.*, 48 A.2d 883, 885 (Pa. Super. Ct. 1946), *aff'd and adopted*, 52 A.2d 205 (Pa. 1947) (per curiam)). Justice Stevens recognized this same doctrine last Term in a case applying an identical rule to this Court's construction of a federal statute: "'A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.'" *Bousley v. United States*, 523 U.S. 614, —, 118 S. Ct. 1604, 1612 (1998) (Stevens, J., concurring in part and dissenting in part) (holding in *Bailey v. United States*, 516 U.S. 137 (1995), explained what 18 U.S.C. § 924(c) had always meant) (quoting *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994)).

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[5] Habeas relief is therefore appropriate because the Pennsylvania lower court decisions denying Fiore's *Jackson v. Virginia* claim were "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1) (1994 & Supp. III). Ambiguities that may exist in other cases with respect to the meaning of that provision of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") are not in issue. *See Williams v. Taylor*, 163 F.3d 860, 865-66 (4th Cir. 1998), *cert. granted*, 119 S. Ct. 1355 (1999) (No. 98-8384). The AEDPA applies because the federal petition was filed in June 1996, after the AEDPA's April 24, 1996, effective date. *See Lindh v. Murphy*, 521 U.S. 320, 326 (1997).

As applied to Fiore's habeas petition, the proposition that section 401 has always meant what the Pennsylvania Supreme Court made explicit in *Scarpone* is uncontroversial, as it is undisputed that the construction articulated in *Scarpone* was the first authoritative pronouncement of the meaning of the phrase "unless such person . . . has first obtained a permit." SWMA § 401, PA. STAT. ANN. tit. 35, § 6018.401. The Pennsylvania Supreme Court overruled no contrary prior precedent in *Scarpone*, and no decision prior to the prosecution of Scarpone and Fiore suggested that the statute meant anything other than what it expressly says.[6]

Amicus NACDL does not here argue that the above canons of statutory construction are necessarily constitutionally required. However, the constitutional principle at issue here is sufficiency of the evidence: Fiore must be granted a writ of habeas corpus because the Commonwealth did not prove every element of the crime charged (properly construed) beyond a reasonable doubt. To determine those elements and their meaning, this Court must look to Pennsylvania's highest court, which has authoritatively construed section 401 of the SWMA to require proof that the defendant did not possess a permit. Under Pennsylvania law, the construction articulated in *Scarpone* was an explication of the elements always required by the statute. To convict, they should have been proven in Fiore's prosecution. To affirm the district court's grant of the writ,

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[6] The contrary construction given the statute by the Superior Court of Pennsylvania in Fiore's case, which conflicted with the intermediate Commonwealth Court in Scarpone's case, is not binding on this or other federal courts. Where a state's highest court has not spoken on an issue, the decisions of intermediate state courts may be considered when ascertaining state law, but are not controlling. *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967). In the absence of authoritative interpretation by the state high court, the federal court has "no choice but to engage in its own construction of the statute." *Vachon*, 414 U.S. at 484 (Rehnquist, J., dissenting).

this Court need only recognize, according to settled principles, an authoritative construction of a state statute.

B. Because the Pennsylvania Supreme Court in *Scarpone* Merely Recognized the Clear Meaning of the SWMA, It Did Not Make "New Law" and There Is No Retroactivity Issue in this Case.

Even if this Court were to reject the proposition that the *Scarpone* decision was an explication what section 401 of the SWMA always meant, that decision was not "new law" triggering a retroactivity analysis and prohibiting a federal court's reference to it in reviewing Fiore's due process claim. Whether formulated as an issue of retroactive application of a state court's reading of a statute or as one governed by *Teague v. Lane*, 489 U.S. 288 (1989),[7] no retroactivity issue is presented where, as here, there simply has been no change in the law. The United States Court of Appeals for the Third Circuit thus erred when it concluded that Fiore was entitled to habeas corpus relief only if the *Scarpone* decision were applied "retroactively."

The question of retroactivity is "whether the court should apply the new rule or the old one." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 534-35 (1991) (plurality opinion). A fortiori, there must *be* an "old" rule and a "new" one. "It is only when the law changes in some respect that an assertion of nonretroactivity may be entertained, the paradigm case arising when a court expressly overrules a precedent upon which the contest would otherwise be decided differently and by which the parties may previously have regulated their conduct." *Id.* at 534. In the context of retroactivity doctrine, a rule is not new unless the issue was novel, innovative principles were necessary to resolve it, or the issue had been previously settled in a contrary manner.

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[7] The plurality decision in *Teague* became authoritative when it was adopted by the majority in *Penry v. Lynaugh*, 492 U.S. 302, 313-14 (1989).

Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 496 (1968).

Contrary to the Third Circuit's holding below, the Pennsylvania Supreme Court's ruling in *Scarpone* cannot be considered "new law" under the foregoing principles. First, there was no prior "old" rule, upon which the state had relied to its detriment. As discussed above, the plain language of the statute states that lack of a permit is an essential element of a section 401 violation, and the *Scarpone* decision so held. Second, Pennsylvania statutory and common law require application of a rule of strict construction to criminal provisions: "[P]enal statutes must be strictly construed, with ambiguities being resolved in favor of the accused." *Commonwealth v. Lassiter*, 722 A.2d 657, 660 (Pa. 1998); 1 PA. CONS. STAT. § 1928(b)(1) (1975);[8] *see also Commonwealth v. Todd*, 384 A.2d 1215, 1217 (Pa. 1978) (under a statute which defines "firearm" with reference to a weapon's length, gun length is an essential element of the crime because penal statutes must be strictly construed). Because the plain statutory language and Pennsylvania rules of construction dictated the outcome in *Scarpone*, and no contrary controlling authority existed, it cannot be considered "new law." Indeed, the Pennsylvania Supreme Court

[8] Pennsylvania has codified its rules of statutory construction, one of which provides: "*All* provisions of a statute in the classes hereafter enumerated shall be strictly construed: (1) Penal provisions." 1 PA. CONS. STAT. § 1928(b)(1) (emphasis added). Thus, while the Pennsylvania Crimes Code contains a construction principle that "the provisions of this title shall be construed according to the fair import of their terms," 18 PA. CONS. STAT. § 105 (1995), the Pennsylvania Supreme Court has read the rule of strict construction to trump: "All statutes are to be read so as to accord fair import of their terms, and in so reading them, certain statutes, namely penal statutes, are to be strictly construed," *Commonwealth v. Besch*, 674 A.2d 655, 660 n.7 (Pa. 1996). Although the SWMA contains a clause that the statute should be liberally construed to best effectuate the statute's goals, SWMA § 901, PA. STAT. ANN. tit. 35, § 6018.901, this must be read in light of the foregoing to apply only to the civil provisions of the statute.

emphasized that the reading of section 401 applied by the trial court in Fiore and Scarpone's case (the construction approved by the court that affirmed Fiore's conviction) was nothing more than a "bald fiction." (J.A. 121.) Retroactivity analysis is thus inapplicable. Third, any other decision in *Scarpone* would have raised serious concerns about whether he had been given constitutionally adequate notice that his conduct was punishable as a felony. The Constitution requires that a criminal statute fairly express what conduct it prohibits, and likewise bars courts from retroactively expanding the statute to cover conduct that "neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier*, 520 U.S. 259, 266 (1997). The Pennsylvania Supreme Court in *Scarpone* refused to countenance felony punishment for conduct expressly prohibited (with a misdemeanor penalty) under section 302. (J.A. 121-22.) Because of due process notice principles, the *Scarpone* decision was "compelled by existing precedent" and cannot be deemed new law subject to retroactivity analysis.[9]

The rule articulated in *Teague v. Lane* is inapplicable to this case not only because there was no "new" rule but also because, as this Court determined last Term in *Bousley v.*

[9] Likewise, *Teague* analysis is required only upon pronouncement of a new rule. Under *Teague*, "a decision announces a new rule if the result was *not* dictated by precedent existing at the time the defendant's conviction became final." *Gilmore v. Taylor*, 508 U.S. 333, 340 (1993) (emphasis added, internal quotation omitted). As discussed above, the result reached in *Scarpone* was dictated by Pennsylvania's rules of statutory construction and settled notions of due process, which unquestionably existed when Fiore's conviction became final – the unpublished decision of the superior court on direct appeal to the contrary notwithstanding. Fiore's conviction "became final" on June 11, 1990, when his right to petition this Court for certiorari expired, after the state Supreme Court refused to hear his direct appeal. *Caspari v. Bohlen*, 510 U.S. 383 (1994); *Allen v. Hardy*, 478 U.S. 255, 258 n.1 (1986) (per curiam); *see Commonwealth v. Fiore*, 575 A.2d 109 (Pa. 1990) (allowance of appeal denied March 13, 1990); SUP. CT. R. 13.1 (ninety days to petition for certiorari).

United States, *Teague* analysis only applies to rules of constitutional criminal procedure. In *Bousley*, this Court reasoned that:

> The only constitutional claim made ... is that petitioner's guilty plea was not knowing and intelligent. There is really nothing new about this principle, enumerated as long ago as *Smith v. O'Grady*, [312 U.S. 329, 334 (1941)]. And because *Teague* by its terms applies only to procedural rules, we think it is inapplicable to the situation in which this Court decides the meaning of a criminal statute enacted by Congress.

523 U.S. at —, 118 S. Ct. at 1610.[10] Likewise, the only constitutional claim Fiore has raised throughout this litigation is the right articulated long ago in *Jackson v. Virginia*, to be convicted only upon proof beyond a reasonable doubt of every element of the crime charged. The "rule" in *Scarpone* was not "new," was not "constitutional" and was not one of "procedure."[11] For all these reasons, *Teague* does not apply.

C. The Autonomy of the Commonwealth of Pennsylvania Would Not Be Infringed by this Court's Reliance on the *Scarpone* Decision in Ruling on Fiore's Habeas Corpus Petition.

The general statement that "the federal constitution has no voice on the subject of retroactivity," relied upon by the court below in denying Fiore a writ of habeas corpus, was misapplied to

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[10] The United States Court of Appeals for the Third Circuit thus misconstrued the relevance of *Bousley* to this case. (Pet. for Writ of Cert., App. A.) *Bousley* does not mandate retroactive application of *Scarpone*, but rather confirms that *Teague* analysis applies only to new rules of constitutional criminal procedure.

[11] Indeed, this point was conceded by the Commonwealth in its brief to the Third Circuit Court of Appeals: "The Pennsylvania Supreme Court decision in *Scarpone* does not announce a new rule of criminal procedure . . . ." and is properly characterized as a decision regarding "statutory construction." (J.A. 272-73.)

this case. (Pet. for Writ of Cert., App. A (internal quotation omitted).) The question presented by Fiore's petition is not whether federal constitutional law requires Pennsylvania state courts to apply the *Scarpone* decision retroactively, but whether a federal habeas court must ignore the *Scarpone* decision in determining the elements of section 401 as applied to Fiore's case. No case cited by the Third Circuit compelled its reversal of the district court, which granted relief, because the cases relied on by the Third Circuit only address the issue of whether federal constitutional law requires a *state* to apply its law in a certain way. *See, e.g., Wainwright v. Stone*, 414 U.S. 21, 23-24 (1973) (per curiam) (Federal Constitution does not dictate whether Florida courts must apply a Florida Supreme Court decision striking down statute prospectively or retrospectively, so long as defendants convicted under the statute had constitutionally proper notice that their acts were criminal when committed);[12] *Great N. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364 (1932) (Federal Constitution says nothing about a *state's* choice of whether to apply a ruling prospectively or retroactively to civil litigants).

Ironically, if the Commonwealth and the Third Circuit are correct, Fiore would be placed in a *worse* position after

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[12] Indeed, *Wainwright v. Stone* supports the result Fiore seeks here. There, the defendants were convicted under Florida's sodomy statute. *Id.* at 21. They sought habeas relief claiming that the statute was unconstitutionally vague and that the Florida Supreme Court had, after their convictions were affirmed, so held. *Id.* at 22-23. This Court denied habeas relief because, at the time the defendants engaged in the offense, Florida case law clearly indicated that their conduct was prohibited. *Id.* at 23. This Court declined to apply retroactively the Florida decision striking down the sodomy statute because the Florida Supreme Court had indicated that the decision would operate prospectively only. *Id.* Moreover, as this Court emphasized, no due process notice concerns were presented because the defendants "were on clear notice that their conduct was criminal under the statute as then construed." *Id.* at 23-24. Unlike the instant case, then, *Wainwright v. Stone* involved a clear change in state case law. In contrast to the defendants in *Wainwright v. Stone*, Fiore had no notice that his conduct was criminal under section 401 when he engaged in it. *See* Part II *infra*.

the Pennsylvania Supreme Court decided *Scarpone* than he would be placed in had *Scarpone* never been decided. Absent the *Scarpone* decision, a federal habeas court would be required to predict how the Supreme Court of Pennsylvania would resolve both the statutory interpretation and constitutional due process issues of Fiore's conviction for disposing of waste without a permit when he in fact had one. *See Vachon*, 414 U.S. at 484 (Rehnquist, J., dissenting); *Estate of Bosch*, 387 U.S. at 465; *King v. Order of United Commercial Travelers of Am.*, 333 U.S. 153, 160-61 (1948). Given the plain language of the statute, Pennsylvania's own rule of strict construction, and due process notice concerns, surely a federal court faced with Fiore's case as a matter of first impression would predict the outcome the Pennsylvania Supreme Court reached in *Scarpone*.

For all these reasons, as well as those presented in petitioner's brief, the judgment of the United States Court of Appeals for the Third Circuit must be reversed.

II. AS A MATTER OF CONSTITUTIONAL DUE PROCESS, THIS COURT IS REQUIRED TO CONSTRUE SECTION 401 OF THE SWMA NARROWLY, AS IT WAS CONSTRUED IN *SCARPONE*, TO PREVENT RETROACTIVE JUDICIAL EXPANSION OF THE SCOPE OF THE STATUTE.

Rejection of one legal rule is always, by implication, adoption of another. If in deciding Fiore's *Jackson v. Virginia* claim this Court were to reject application of the interpretation of section 401 reached in *Scarpone*, it would be adopting a reading of the statute fraught with due process difficulties.[13] The question presented by

[13] The Court would also be following an interpretation of the SWMA adopted by one Pennsylvania state trial court, and non-precedentially by an intermediate appellate court, but rejected by two Pennsylvania higher courts. In reviewing Fiore's direct appeal, the Superior Court of Pennsylvania did not discuss Fiore's sufficiency of the evidence argument but rather "affirm[ed] on the basis of the opinion of the court below." (J.A. 99-100.) Fiore's request for allowance of appeal to the Supreme Court of

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Fiore's habeas petition is not whether reference to the *Scarpone* decision would require impermissible retroactive application of that decision, but whether any interpretation of section 401 other than the one reached in *Scarpone* would be constitutionally permissible, as applied to Fiore. *Amicus* urges that it would not. Settled principles of due process mandate that a federal court, reviewing Fiore's claim, construe section 401 in a manner that preserves his right to notice that his conduct could be considered a felony violation of law.[14] Adoption of the trial court's reading of section 401 would violate the Due Process Clause as an impermissible judicial broadening of the felony provisions of the SWMA to apply to Fiore's conduct. *Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964). In this respect, the Due Process Clause places a control on judicial action that is equivalent to the restriction placed on the Legislature by the Ex Post Facto

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Pennsylvania was denied in an unpublished order in March 1990. *Commonwealth v. Fiore*, 575 A.2d 109 (Pa. 1990). Thus the trial court is the *only* court to have discussed in any depth the theory of the SWMA supporting Fiore's conviction. Both the Pennsylvania Commonwealth Court and Supreme Court, in co-defendant Scarpone's case, rejected the analysis applied by the trial court and adopted by the Superior Court panel in Fiore's case. (J.A. 110-11; 122.)

[14] The fact that the petitioner had notice that his conduct was punishable as a misdemeanor under another statute does not deny him the right to due process and proper notice of the full consequences of his actions. In *Bouie v. City of Columbia*, this Court observed that it was "irrelevant" that the petitioners might have intended to be arrested, as the "determination whether a criminal statute provides fair warning" must be made objectively, "rather than on the basis of an ad hoc appraisal of the subjective expectations of particular defendants." 378 U.S. 347, 355 n.5 (1964). Moreover, this Court has repeatedly held that the Ex Post Facto Clause, upon which the due process concerns in this case are based, "forbids the application of any new punitive measure to a crime already consummated." *Lindsey v. Washington*, 301 U.S. 397, 401 (1937); *accord California Dep't of Corrections v. Morales*, 514 U.S. 499, 504-05 (1995); *Collins v. Youngblood*, 497 U.S. 37, 43 (1990). That Fiore may have been on notice of misdemeanor punishment does not forfeit his right to notice of possible felony punishment for identical conduct.

Clause. *Marks v. United States*, 430 U.S. 188, 192 (1977) (citing *Bouie*, 378 U.S. at 353-54).

Federal courts are the final arbiters of whether, in general or as applied, a state criminal law violates due process. *New York v. Ferber*, 458 U.S. 747, 767 (1982); *Brown v. Ohio*, 432 U.S. 101, 169 (1977). This Court has long recognized that every citizen is protected by the essential right of "fair warning" before being accused - let alone convicted - of criminal conduct. *United States v. Lanier*, 520 U.S. 259, 266-67 (1997). Central to this protection is the concept that "due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *Id.* at 266. To ensure that a person is not subject to the arbitrary imposition of criminal penalties, federal courts ask essentially one question: "[W]hether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *Id.* at 267. In the instant case, that question must resoundingly be answered in the negative.

In *Bouie v. City of Columbia*, sit-in demonstrators were convicted of trespass under a city ordinance that defined the prohibited conduct as "entry on lands of another . . . after notice from the owner or tenant prohibiting such entry." 378 U.S. at 350 n.1 (internal quotation omitted). No evidence was presented that the defendants had been given notice that they were prohibited from entering the premises where they were arrested. Their convictions, nevertheless, were affirmed by the South Carolina Supreme Court on the theory that the city trespass ordinance "cover[ed] not only the act of entry on the premises of another after receiving notice not to enter, but also the act of remaining on the premises of another after receiving notice to leave." *Id.* at 350. The Court reversed the convictions, holding that the judicial expansion of the statute violated due process. By doing so, this Court recognized that:

> [A] deprivation of the right of fair warning can result not only from vague statutory language but

> also from an unforeseeable and retroactive judicial expansion of *narrow and precise statutory language*. . . . [A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, § 10, of the constitution forbids.

Id. at 352-53 (emphasis added).[15]

Exactly the same situation was presented here by the superior court's action. Fiore's conviction was affirmed only because the trial court enlarged section 401 of the SWMA, at the prosecutor's request, to cover conduct not prohibited by the language (or any prior construction) of the statute. Indeed, the reasoning of *Bouie* is especially relevant to Fiore's claim, as misdemeanor penalties were available to deter and punish the precise conduct in which Fiore engaged. *Compare* SWMA §§ 401, 606(f), PA. STAT. ANN. tit. 35, §§ 6018.401, 6018.606(f) (West 1993) (defining felony penalties for disposing of waste without a permit), *with id.* §§ 302, 606(b), PA. STAT. ANN. tit. 35, §§ 6018.302, 6018.606(b) (defining misdemeanor penalties for disposing of waste in violation of

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[15] *See Rabe v. Washington*, 405 U.S. 313, 316 (1972) (per curiam) ("[A] State may not criminally punish the exhibition at a drive-in theater of a motion picture where the statute, used to support the conviction, has not given fair notice that the location of the exhibition was a vital element of the offense."); *see also Marks*, 430 U.S. at 188. In *Marks*, the defendants had transported obscene materials during the time that controlling Supreme Court precedent stated that the First Amendment protected expressive material unless it was "utterly without redeeming value." *Id.* at 191 (internal quotation omitted). Prior to their trial, the Court decided *Miller v. California*, 413 U.S. 15 (1973), under which "the comparable test is 'whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.'" *Id.* (quoting *Miller*, 413 U.S. at 24). At trial, the jury was instructed with the *Miller* standards. *Id.* at 191. Noting that certain conduct permissible under the earlier standard would be prohibited under *Miller*, the Court granted the defendants a new trial because the Due Process Clause precluded them from being punished for conduct that was not criminal when they engaged in it. *Id.* at 196.

the conditions of a permit). No fair and objective reading of the statute warned Fiore that section 401 could be applied to his conduct by an expansive, non-literal reading of the statute endorsed by the lower Pennsylvania courts.[16]

When Fiore filed his habeas petition claiming a violation of *Jackson v. Virginia*, he asked a federal court to determine whether sufficient evidence existed to sustain his conviction. In making this determination, the federal court cannot rely on an unconstitutionally broad reading of the elements of the crime charged. To do otherwise would violate petitioner's rights anew and would punish conduct the state has not constitutionally made criminal, a principle this Court has rejected. *See Rabe v. Washington*, 405 U.S. 313, 316 (1972) (per curiam); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 91-92 (1965).[17] There has been no determination that the

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[16] Vagueness concerns are particularly acute in this case because the Pennsylvania legislature has defined the felony of which Fiore was convicted to be an absolute liability offense that does not require proof of mens rea. *Id.* § 606(i), PA. STAT. ANN. tit. 35, § 6018.606(i); *see Colautti v. Franklin*, 439 U.S. 379, 395 (1979) (statute's vagueness aggravated by lack of mens rea); *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 342 (1952) (mens rea requirement reduces vagueness concerns).

[17] In *Shuttlesworth*, this Court considered the appeal of a defendant who was of loitering under the Birmingham General City Code. The Court determined that the language of Birmingham's loitering statute was unconstitutionally vague and overbroad, *id.* at 90, but recognized that the Alabama Court of Appeals had narrowed the statute in a manner that comported with due process, *id.* at 91. Shuttlesworth, however, had been convicted of loitering prior the Alabama court's authoritative construction of the statute. *Id.* at 92. His conviction, therefore was invalid:

> For all that appears, [the trial] court may have found petitioner guilty only by applying the literal – and unconstitutional – terms of the ordinance. . . . Because we are unable to say that the Alabama courts in this case did not judge the petitioner by an unconstitutional construction of the ordinance, the petitioner's conviction under [the statute] cannot stand.

Id. This Court need not speculate about the trial court's application of Pennsylvania's SWMA to Fiore's conduct, because the court upheld Fiore's conviction on the basis that his actions "represented such a

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trial court's interpretation of section 401 of the SWMA in Fiore's case was unconstitutionally overbroad, and *amicus* does not ask this Court to make such a finding. In considering what elements the Commonwealth had to prove at trial, however, this Court should not rely on a reading of a statute that is constitutionally suspect. The lower federal courts erred in viewing the question of how to define the elements of section 401 in habeas analysis as one of "retroactivity" of the *Scarpone* decision. In applying the *Jackson v. Virginia* standard to Fiore's case, a federal habeas court may neither announce nor adopt a reading of section 401 that violates due process. The Supreme Court of Pennsylvania avoided the due process issue in *Scarpone* by reading the statute narrowly; the Court here must read the statute in the same way.

On a fair and constitutional reading of the statute of conviction, the judgment of the court below must be reversed.

(. . . continued)

significant departure from the terms of the existing permit that the operation of the waste facility was 'un-permitted.'" (J.A. 44.)

CONCLUSION

For the foregoing reasons, NACDL urges this Court to correct the constitutional error in the decision below. The Court should reverse the judgment of the United States Court of Appeals for the Third Circuit and remand the case with directions to grant Fiore an unconditional writ of habeas corpus.

Respectfully submitted,

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